GREENPOWER VALUE SDN BHD v. UNIVERSAL TRUSTEE (MALAYSIA) BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[ORIGINATING SUMMONS NO: 24NCC-134-04-2014]
24 APRIL 2020

CIVIL PROCEDURE: *Committal proceedings – Application for – Allegation of breach of consent order – Whether consent order superseded by subsequent sale and purchase agreement – Whether consent order to be enforced by civil proceedings – Whether consent order bore endorsement of penal notice – Whether failure to endorse penal notice fatal – Whether application against person not party to consent order ought to fail – Whether prima facie case for grant of committal order established – Rules of Court 2012, O. 52 r. 3*

Various legal proceedings were initiated in respect of five-year redeemable convertible secured notes ('RCSN') issued by Gula Perak Bhd and lands charged to secure the RCSN. The RCSN was primarily held by the third to seventh defendants ('banks') on the one part and the plaintiff, the first alleged contemnor ('Tan Sri Lim') and the second defendant ('Pavilion Yields') on the other part. The first defendant was appointed as trustee for all the noteholders. A consent order was recorded in the suit between the plaintiff and the first defendant, Pavilion Yields and the banks with the objective of putting an end to all disputes regarding the RCSN by facilitating a buy-out of the RCSN held by the banks. Tan Sri Lim, who was not a party to the suit or the consent order, had furnished a letter confirming that he agreed to and would comply with the terms of the consent order concerning him ('side letter'). Pursuant to the consent order, a sale and purchase agreement ('SPA') was executed between the banks, Tan Sri Lim and Million Westlink Sdn Bhd for the purchase of the RCSN by Million Westlink. A guarantee was executed by Tan Sri Lim guaranteeing the performance of the SPA by Million Westlink. However, Million Westlink defaulted in payments under the SPA and guarantee resulting in the filing of a suit by the banks to enforce their rights under the SPA and the guarantee ('SPA action'). Tan Sri Lim and Million Westlink filed a counterclaim and an interim injunction application to enlarge the timeline for the performance of the SPA and to restrain the trustee from proceeding with the recovery actions of RCSN and subsequently, an *Erinford* injunction. The banks alleged that the filing of the counterclaim, injunction and *Erinford* injunction was in breach of the consent order as well as the side letter, and thus obtained leave to commence committal proceedings against the alleged contemnors pursuant to O. 52 r. 3 of the Rules of Court ('ROC') ('leave order'). Hence, these applications to set aside the leave order in (i) encl. 45 by the third and fourth alleged

contemnors; (ii) encl. 47 by the second alleged contemnor, Pavilion Yields; and (iii) encl. 61 by Tan Sri Lim. Whereas, the banks' application *via* encl. 38 was for a committal order against the alleged contemnors.

Held (allowing applications in encls. 45, 47 and 61; setting aside leave order for committal and striking out encl. 38):

(1) The consent order was followed up with the SPA. The deliberate incorporation of the salient clauses of the consent order into the SPA supported the contention that the final governing agreement between the parties was the SPA. Hence, by virtue of the SPA, the consent order was clearly spent and superseded by the last agreement. The banks' own conduct in filing the SPA action demonstrated that the consent order which went on to morph into the SPA was intended to be enforced by way of civil proceedings and not contempt proceedings. As such, the basis for the contempt proceedings must fall. (paras 33, 35 & 40-42)

(2) If the consent order was meant to have penal implications, it must bear an endorsement of a penal notice so as to give notice to the alleged contemnors that they may potentially face penal sanctions if they fail to abide by the said order. In this case, the failure to endorse the consent order with a penal notice was based on the original intention that the consent order was never meant to be enforced by way of committal proceedings. This finding was further fortified when the parties embarked on negotiating the SPA. As such, the failure to have a penal notice endorsed on the consent order was fatal to the case of the banks. Further, the drafting of the consent order was not in any manner coercive. Instead, it merely laid down the obligations of the parties. There was no threat of any action which was penal in nature incorporated into the consent order and hence, supported the argument that the consent order was worded as an agreement. (paras 47, 50 & 52)

(3) The argument to extend the liability of Tan Sri Lim under the consent order *via* the side letter was a non-starter. His liability arose after the consent order came into existence. He could not, therefore, be a party to the consent order originally entered between all parties. At best, his obligations were under the SPA entered between the parties. The argument by the banks that Tan Sri Lim was the 'architect and mind' or 'driving force and principal person' behind the actions of the other alleged contemnors was not backed by any factual allegation in the O. 52 statement. Such vague allegations could not survive the strict requirements of O. 52 and was fundamentally flawed. (paras 54-56)

(4) In order to enforce a judgment by an order of committal under O. 45 r. 5(1)(A), the consent order must be served personally on the person affected. Failure to serve Tan Sri Lim personally with the consent order was fatal to the banks' case. The banks also failed to inform the court,

at the leave application, that Tan Sri Lim (i) was not a party to the consent order; (ii) was not personally served with the sealed consent order or that there was no penal notice endorsed on the consent order; and (iii) was not given notice of any of the alleged breaches of the consent order. The material non-disclosures were fatal as the banks only disclosed facts favourable to them. Therefore, the banks failed to establish a *prima facie* case against Tan Sri Lim. (paras 60, 62, 64, 66 & 68)

(5) The O. 52 statement used by the banks in their leave application was poorly drafted as it did not particularise with precision the alleged contemptuous act of Pavilion Yields. The basis to initiate the contempt proceedings was found on the banks' claim that Pavilion Yields was to 'undertake not to file any further stay and/or injunction applications to prevent any actions from proceeding'. However, Pavilion Yields did not file any stay or injunction application. This was in direct contradiction to the 'breach' alleged which had to be clearly specified in the O. 52 statement. Such failure was fatal to the case of the banks. (paras 69 & 71)

(6) The third and fourth alleged contemnors acted in the capacity of the representatives of Pavilion Yields who believed that they had a right to embark on the said Pavilion Yields' OS. Given the finding that the banks had failed to prove a *prima facie* case of contempt against Pavilion Yields, it followed that no *prima facie* case had been established against the third and fourth alleged contemnors. (para 73)

Case(s) referred to:

Agricultural Land Commission v. Monroe [2006] BCJ No. 2149 ***(refd)***
Basset v. Magee [2015] BCJ No 2166 ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Capital Insurance Bhd v. BS Sidhu [1995] 1 LNS 306 CA ***(refd)***
Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd [2009] 2 CLJ 445 CA ***(refd)***
Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors [2009] 5 CLJ 412 CA ***(refd)***
Dewan Perniagaan Melayu Malaysia, Negeri Johor v. Menteri Besar Johor & Ors [2016] 1 CLJ 52 HC ***(refd)***
Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd [2009] 2 CLJ 221 CA ***(refd)***
Lee Lay Ling v. Goh Kim Nam & Anor [2013] 1 LNS 1000 HC ***(refd)***
Lim Chau Leng (p) v. Wong Chee Chong [2006] 2 MLJ 269 ***(refd)***
Macronet Sdn Bhd v. RHB Bank Bhd [2002] 4 CLJ 729 HC ***(refd)***
Malayan Banking Bhd & Ors v. Pang Sor Tin [2015] 1 LNS 577 HC ***(refd)***
Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***
Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***
Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang [2013] 1 CLJ 1060 CA ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 LNS 126 FC ***(refd)***
Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd [2011] 1 LNS 1853 CA ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 45 rr. 5(1)(A), 7(2)(a), (4), O. 52 rr. 2B, 3(2)

For the applicant in encl. 38 - H H Ng & Denise Teoh; M/s Shook Lin & Bok
For the 3rd & 4th alleged contemnor/applicant in encl. 45 - Wong Rhen Yen & Siti Nur Amirah; M/s S Ravenesan
For the applicant in encl. 47 - Malik Imtiaz Sarwar, Jamie Wong, Chan Wei June & Shugan Raman; M/s Jamie Wong
For the 1st alleged contemnor/applicant in encl. 61 - Robert Low, Ng Chin Wern, Khong Mei-Yan; M/s Ranjit Ooi & Robert Low

Reported by S Barathi

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

[1] This judgment concerns the following four appeals filed by the third to seventh defendants ("the banks") against this court's decision with regards to the enclosures below:

(i) enclosure 45: an application filed by Lo Hooi Lin and Maznah binti Baba, ie, the third and fourth alleged contemnors to set aside *ex parte* leave for committal dated 20 January 2016 obtained by the banks;

(ii) enclosure 47: an application filed by the second defendant, ie, the second alleged contemnor ("Pavilion Yields") to set aside *ex parte* leave for committal dated 20 January 2016 obtained by the banks;

(iii) enclosure 61: an application filed by Tan Sri Dato' Lim Cheng Pow, the first alleged contemnor ("Tan Sri Lim") to set aside *ex parte* leave for committal dated 20 January 2016 obtained by the banks; and

(iv) enclosure 38: the banks' application for a committal order against the alleged contemnors.

[2] On 23 October 2019, this court allowed encls. 45, 47 and 61 with costs. Consequently, encl. 38 fell and was struck out. Given the fact that encl. 38 was not heard on merits and the striking out was merely a consequential order, this judgment will only concern encls. 45, 47 and 61.

[3] The following are the grounds of decisions of this court.

Background Facts

[4] On 14 January 2016, the banks filed an *ex parte* application in encl. 25 for leave to commence committal proceedings against the alleged contemnors pursuant to O. 52 r. 3 of the Rules of Court 2012 ("ROC 2012"). On 20 January 2016, the leave was granted ("the leave order").

[5] The leave order was premised on purported breach of consent order dated 11 April 2014 ("the consent order"). The alleged contemnors were said to deliberately fail to comply and/or obey and/or give effect to para. 2(b) of the consent order of this court in respect of the alleged contemnors' undertaking not to file any further stay and/or injunction application to prevent any auction from proceeding ("the stay provision").

[6] The events leading to the recording of the consent order were as follows:

(i) Various legal proceedings were initiated in respect of five year redeemable convertible secured notes ("RCSN") issued by Gula Perak Berhad ("Gula Perak") and lands charged to secure the RCSN. The legal proceedings include foreclosure actions in respect of the charged lands to recover monies due under the RCSN when Gula Perak failed to pay and redeem the RCSN from the noteholders by the maturity date.

(ii) The RCSN was primarily held by the banks on the one part and the plaintiff, Tan Sri Lim and Pavilion Yields on the other part. The first defendant was appointed as trustee for all the noteholders ("the trustee").

(iii) The consent order was recorded in the suit herein between the plaintiff, the first defendant, Pavilion Yields and the banks. Tan Sri Lim was not a party to this suit or the consent order. He had furnished a letter dated 11 April 2014 confirming that he agreed to and would comply with the terms of the consent order concerning him ("the side letter").

(iv) The consent order was entered into with the objective of putting an end to all disputes regarding the RCSN by facilitating a buy-out of the RCSN held by the banks.

[7] Various safeguards were agreed to preserve the *status quo* of the parties. Among these safeguards was the stay provision which provides:

> 2. Tan Sri Dato' Lim Cheng Pow ("Tan Sri Lim"), Greenpower Value Sdn. Bhd. ("Greenpower"), Pavilion Yields Sdn. Bhd. ("Pavilion"), Dynawell Corporation (M) Sdn. Bhd. ("Dynawell"), KSB Requirements & Rest Sdn. Bhd. ("KSB"), Joint Management Body of Golden City Condominium (under its current composition of Board members) ("JMB GCC"), Mirage Point Sdn. Bhd. ("Mirage"), Kesenta Development Sdn. Bhd. ("Kesenta"), Tan Sri Datuk Seri (Dr) Elyas Omar ("TSEO"), Leisure Group Hotels & Resorts Sdn. Bhd. ("Leisure Group") and/or parties related to Tan Sri Lim will:
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> …

A (b) undertake not to file any further stay and/or injunction application to prevent any auctions from proceeding;

…

(d) not file any fresh suits/actions in relation to the RCSN (as defined below) or the security, including the lands charged to B secure the RCSN so long as the parties are still in negotiations on the buy-out of the RCSN as described below. The provisions of this sub-paragraph shall also apply similarly to the Trustee and the 3rd to 7th Defendants.

[8] A sale and purchase agreement dated 5 August 2014 ("SPA") was C executed pursuant to the consent order between the banks, Tan Sri Lim and Million Westlink Sdn Bhd ("Million Westlink") for the purchase of the RCSN by Million Westlink.

[9] A guarantee dated 5 August 2014 was also executed by Tan Sri Lim guaranteeing performance of the SPA by Million Westlink ("guarantee"). D

[10] Million Westlink however defaulted in payments under the SPA and guarantee which resulted in the filing of Kuala Lumpur High Court Suit No: 22NCC-163-03-2015 by the banks against him and Million Westlink to enforce their rights under the SPA and the guarantee ("the SPA action").

E **[11]** Tan Sri Lim and Million Westlink filed a counterclaim and an interim injunction application in the SPA action to enlarge the timeline for the performance of the SPA and to restrain the trustee from proceedings with the recovery actions of the RCSN.

[12] The injunction application was dismissed by the High Court. The F dismissal was appealed against by Tan Sri Lim and Million Westlink and they also sought an *Erinford* injunction to preserve the *status quo* pending the disposal of this appeal. The *Erinford* injunction was subsequently dismissed by the Court of Appeal on 8 September 2015.

G **Purported Breaches Of The Consent Order**

First Purported Breach – Injunctions By Tan Sri Lim And Million Westlink

[13] The banks alleged that the filing of the counterclaim, the injunction application and the *Erinford* injunction is purportedly in breach of the consent order as well as the side letter which forms the basis for the leave order.

H *Second Purported Breach – Pavilion Yields' Application To Intervene In Dynasty Hotel Charge Action In Kuala Lumpur Originating Summons No: 24NCVC-2980-11-2011 ("The Intervener Application")*

[14] The intervener application was filed seeking for the trustee to adopt I the highest valuation of the Dynasty Hotel land, one of the charged lands granted by Gula Perak in favour of the trustee.

[15] The banks contended that the intervener application was filed with the purpose of impeding the foreclosure proceedings of Dynasty Hotel and is in breach of the consent order.

Third Purported Breach – The Filing Of Pavilion Yields' Kuala Lumpur Originating Summons No: 24NCVC-1476-09-2015 ("Pavilion Yields' OS")

[16] Pavilion Yields' OS was filed seeking for declaratory reliefs on the interpretation of cl. 17(c) and 17(d) of the trust deed dated 11 December 2002.

[17] The banks argued that the reliefs sought in the Pavilion Yield OS if granted would have the effect of preventing the auctions of the charged lands from proceeding and similarly is in breach of the consent order.

[18] It is to be noted that the third and fourth alleged contemnors were named as the alleged contemnors in their capacity as directors of Pavilion Yields. The fourth alleged contemnor affirmed the affidavit-in-support of the intervener application and the Pavilion Yields' OS.

[19] The alleged contemnors filed encls. 45, 47 and 61 to set aside the leave order and to stay the committal proceedings against them.

[20] After hearing submissions by the alleged contemnors and the banks, this court allowed the three enclosures.

Parties' Contention

[21] It is the common position of the alleged contemnors that they are not in breach of the consent order.

[22] They argued that the consent order was never intended to be enforced by and/or could not be enforced through committal proceedings.

[23] In any event, it was submitted that the banks have failed to comply with the procedural safeguards and strict requirements for leave to commence committal proceedings provided under the ROC 2012. Since the requirements were not met, the banks have failed to show any *prima facie* case of contempt against them.

[24] It is also the common argument of the alleged contemnors that there is unreasonable delay on the bank's part in filing encl. 25 and it was not made *bona fide* in that there was material non-disclosure by the banks.

[25] Tan Sri Lim and Pavilion Yields in encls. 61 and 47 had also raised the fact that the consent order has no penal notice endorsed to it as required by O. 45 r. 7(4) of the ROC 2012 and therefore, no contempt liability can arise.

[26] In addition to that, in encl. 47, Pavilion Yields also submitted that the banks have failed to comply with O. 52 r. 2B of the ROC 2012 by failing to serve a formal notice to show cause to it before the filing of encl. 25. In its submission, it also argued that the banks have waived their right to rely on the consent order as basis to initiate contempt proceedings. The trustee and the banks had effectively compromised the consent order and the SPA by pursuing the suit against Million Westlink and through the foreclosure proceedings. Their conduct further reinforces the point that parties never intended for the consent order to be enforced by way of committal proceedings.

[27] Tan Sri Lim in his application under encl. 61 submitted that the consent order is not binding on him as a non-party and thus, the banks cannot enforce the consent order against him. Furthermore, it was argued that contrary to O. 45 r. 7(2)(a) of the ROC 2012, the consent order was not served on him personally nor was he given notice of any alleged breach of the consent order until the leave order was obtained.

[28] Tan Sri Lim also maintained that since the purpose of the consent order has been satisfied with the successful conclusion of the negotiations, the consent order is now spent. Alternatively, it was submitted that the terms of the consent order have now been superseded by the SPA.

Analysis On The Common Areas Of Arguments

The Consent Order

[29] In this regard, it is settled law that a consent order is a contract between two parties formalised before the court. The court in which it is formalised has no role but only to record the agreement between parties. The content of the consent order is very much left to the parties to agree upon. If there is any unconscionable terms agreed upon, it is up to the parties to scrutinise and consent to. It is to be interpreted using general contractual interpretation principles. The surrounding circumstances leading to the consent order and the purpose of the same which is the settlement, must be considered. In *Agricultural Land Commission v. Monroe* [2006] BCJ No. 2149, The British Columbia Supreme Court held as follows:

> 69. The basic principles of interpretation used when considering consent orders are these:
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> a) The starting point for interpreting a consent order is determining what the parties were agreeing to settle: *Bankirk Developments Ltd. v. Orca Estates Ltd.*, [2006] B.C.J. No. 1089, 2006 BCCA 238 at paragraph 10.
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> b) Once the purpose of the consent order has been determined, the court should make sense of its provisions. *As the consent order forms a contract between the parties, general contractual interpretation principles*

apply, and the court should strive to give meaning to each and every provision in the order: Bankirk at paragraph 12, citing *Streifel v. First Heritage Savings Credit Union* [1992] B.C.J. No. 2472 (CA) at paragraph 8.

c) *In determining the parties' mutual intention, the circumstances in which the order was made and the intention of the parties must be viewed objectively, considering the language of the order itself, viewed against the factual matrix in which the order was made:* Bankirk at paragraph 13, citing *Reliant Capital Ltd. v. Silverdale Development Corp.,* [2006] B.C.J. No. 1028, 2006 BCCA 226 at paragraph 76.

d) *If the words of the order produce a clear ambiguity that must be resolved in order to achieve the object of the order, regard may be had to other evidence*: Bankirk at paragraph 14. In such cases of ambiguity, the court may look at documentary evidence leading to the drafting and signing of the order, and to a lesser degree, what has occurred since the order was signed: *Maximum Separation Systems v. Solometex Inc.*, [2004] F.C.J. No. 884, 2004 FC 689 at paragraph 12.

(emphasis added)

(See also *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597).

[30] In *Lim Chau Leng (p) v. Wong Chee Chong* [2006] 2 MLJ 269, Faiza Tamby Chik J held that the order entered by consent with the plaintiff was an embodiment of the terms agreed between the parties before the trial of the divorce petition. It is not an order of the court in the true sense with directions. The court did not decide anything on merits. No decision or direction was made by the court as the court merely recorded the agreement of the parties and set the seal of the court on it.

[31] In *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301, it was held that consent order derives its effect from what is incorporated in it. The court held as follows:

> ... a consent judgment or order is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the court, and its force and effect derives from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action ...

[32] The case of *Lim Chau Leng (p) v. Wong Chee Chong* (*supra*) established the following principles:

> [10] What is important here is that the terms agreed upon came from the parties to the court and not from the court to the parties. It was never denied that the consent order dated 12 November 2003 with the seal of the court affixed to it made it a court order. But is it an order of the court with imperative directions or coerciveness. It lacks coerciveness taking into

account the manner the consent order came about. I can only re-quote the passage from *Badri Dass v. Labhu Mal* AIR 1959 Punjab 322 which reads:

> The statement of the defendant read as a whole leaves no doubt in my mind that it was based upon a private compromise arrived at between the parties outside the court. Instead of presenting a written composition deed the defendant detailed the terms of the compromise in his statement and a decree on the basis of it was passed. The undertaking was thus not given to the court but to the plaintiff. It was no more than a solemn promise by the defendant to the plaintiff and the nature of that promise or undertaking could never be changed by reason of the compromise being accepted by the court and a decree passed in its terms. The principle is well settled that the breach of such an undertaking or promise does not amount to contempt of court.
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> [11] So, what we have in our case is a set of promise made by the defendant to the plaintiff to do or not to do an act. That is all. There are no promises made to the court by the defendant. The court merely acknowledged this agreement by affixing its seal which brought the suit to an end. The defendant by making these promises (and the plaintiff accepting them) did not hoodwink the court into bringing the suit to an end. The decision to compromise and to end the suit was entirely by the parties. The law of contempt of court does not envisage institution of committal proceedings for a breach of a term agreed by parties merely because it is embodied in a court order.

[33] As such, when the parties entered into the consent order, it was an agreement reached between all parties. From what was made available to this court, the consent order was followed up with a SPA. This in essence means that the parties then transferred their obligation to the SPA.

Whether The Consent Order Is Spent Or Superseded By The SPA

[34] The consent order which is essentially contractual in nature and the superadded command of the court on the consent order cannot make it any less a contract. It was highlighted to this court that it was the banks' own submission that negotiations were entered into the SPA because of the consent order.

[35] This court finds the deliberate incorporation of the salient clauses of the consent order into the SPA supports the contention that the final governing agreement between parties is the SPA. It clearly superseded the consent order. Furthermore, a perusal of the SPA shows that an entire agreement clause was incorporated into the SPA.

[36] The entire agreement clause effectively means that the full contractual terms are to be found in the final document which is the SPA. All other documents are excluded. The support for this contention can be found in many decided authorities. (See *Malayan Banking Bhd & Ors v. Pang Sor Tin* [2015] 1 LNS 577; *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; [2005] 3 MLJ 585; and *Macronet Sdn Bhd v. RHB Bank Bhd* [2002] 4 CLJ 729; [2002] 3 MLJ 11).

[37] A perusal of the banks' submission shows a concession on the part of the banks that the catalyst to the entering of the SPA was the consent order. In the affidavit of the bank's representative, one Saraswathy Varadarajan averred that only after the consent order was entered into that parties embarked on lengthy negotiations for settlement which eventually culminated in the SPA. A position taken by one party and evidence by way of affidavit evidence is an admission of how the consent order was meant to operate. In *Zulpadli Mohammad & Ors v. Bank Pertanian Malaysia Bhd* [2011] 1 LNS 1853; [2013] 2 MLJ 915, the Court of Appeal held as follows:

> [20] The foregoing in law amounts to judicial admissions which had been made by the respondent. In this regard, we are in agreement with the decision in the case of *Hu Chang Pee v. Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402 (subsequently affirmed by the Court of Appeal in *Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v. Hu Chang Pee (also known as Hii Chang Pee)* [2011] 6 MLJ 193; [2010] 1 LNS 1269) as follows:
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> > (2) The plaintiff in entitled to rely on the defendant's affidavit filed in Suit No 22-18-96 as the basis in the present suit. What was stated by the defendant in his affidavit dated 3 December 1996 was actually an admission by him. Admission in pleadings is judicial admission and can be made the foundation of rights. Admission are admissible against the party making them.
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> [21] Further in *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, Mahadev Shanker JCA held as follows:
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> > For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom.

[38] It was brought to the attention of this court that the banks argued by virtue of the entire agreement clause, parties expressly agreed to be bound only by the terms of the SPA and cannot imply any other term into the SPA.

[39] This was relied upon during the SPA action against Tan Sri Lim and Million Westlink. The banks' arguments were made as follows:

> 16. *The Defendants have attempted to rely on the Consent Order* and past matters to imply that the Redemption Arrangement is critical to the SPA. *However, there is an "entire agreement" clause in the SPA, whereby the Defendants had expressly agreed to be bound only by the terms of the SPA, and cannot attempt to imply any further term into the SPA.*

A ...

17. It is well established that an "entire agreement" clause means that the agreement constitutes the entirety of the agreement between parties with regard to all the matters mentioned in the contract and *no other term may be implied or any other consideration imported in the contract.*

B (emphasis added)

[40] As such, the banks cannot now argue that the entire agreement clause allows references to other documents. They are clearly estopped from doing so. By virtue of the SPA, the consent order is clearly spent and superseded C by the last agreement

[41] The banks' own conduct in filing the SPA action demonstrates that the consent order which went on to morph into the SPA was intended to be enforced by way of civil proceedings and not contempt proceedings.

D **[42]** It is the finding of this court that the SPA superseded the consent order. It is also the finding of this court that the entire agreement clause results in the SPA being the sole document that binds the parties therein. As such, the basis for the contempt proceedings must fall. The recourse for the banks must be the SPA itself and not by way of contempt proceedings.

E *Whether The O. 52 Statement Was Sufficiently Particularised To Provide The Requisite Notice*

[43] It is a settled position of law that a statement under O. 52 r. 3(2) of the ROC 2012 accompanying the notice of application for leave requires grounds on which the committal is sought to be particularised in the F statement.

[44] It draws similar comparison in a criminal charge where the charge against an accused person must outline the alleged act and the relevant provision of the law the accused violated. The accused must be able to understand the charge. It must not be one which is lacking in particulars to G deprive the accused a right to defend himself. It cannot be duplicitous or relate to an offence unknown in law.

[45] In the context of a committal proceeding, the statement must contain the specific allegation of the alleged contemptuous act. Given that committal proceedings have penal implications, it must be drafted with specific, H identifiable and precise allegation of facts. It cannot be a general statement as it will fail the test of particularisation. The intent is to enable the contemnor full knowledge what charge he is facing so as to enable him to meet or respond to the charge accordingly. The act of contempt must be adequately described and particularised in detail within the statement itself. I (See *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458; and *Dewan Perniagaan Melayu Malaysia, Negeri Johor v. Menteri Besar Johor & Ors* [2016] 1 CLJ 52).

[46] In *Basset v. Magee* [2015] BCJ No. 2166, the British Columbia Court of Appeal held that the order said to be in breach must be clear and strictly construed:

> 35. The notion of *strictissimi juris* encompasses more than the examples given in *Peel*. It requires close adherence to procedural requirements: a precision in pleadings, procedure and evidence appropriate to the nature of the process which engages the court in a conflict with one of the parties. The process must be carried out with great care. The order said to be breached must be clear, for it will be strictly construed.

Whether A Penal Notice Is A Prerequisite

[47] It is the view of this court if the consent order was meant to have penal implications, it must bear an endorsement of a penal notice. Only by endorsing the penal notice will it give notice to the alleged contemnors that they may potentially face penal sanctions if they fail to abide by the said order. In the Court of Appeal case of *Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd* [2009] 2 CLJ 221, it was held that a failure to endorse a penal notice was fatally flawed. The court held as follows:

> Where the body corporate or alleged contemnor is not served with the order bearing the appropriate penal endorsement as required under O. 45 r. 7(4), the application for committal was fatally flawed ...

[48] It would however, be an exception if the words of the consent order contain undertakings to court or is coercive in nature.

[49] In *Lee Lay Ling v. Goh Kim Nam & Anor* [2013] 1 LNS 1000, [2014] 8 MLJ 805, S Nantha Balan JC (as he then was) held that even if there was a penal notice, the terms as contained in the order had to be examined for substance and must ultimately be one which was recognised by law as constituting an act, the disobedience of which would attract the penalties or punishment which would flow from its breach or disobedience.

> The order had 13 terms, of which payment obligations were only a part of the order. There were several non-monetary aspects of the order, the disobedience of which would amount to contempt of court. There was no merit in this point. *The mere presence of the penal endorsement was not sufficient to overcome the prohibition to contempt and committal. Thus, the mere presence of the penal endorsement did not of itself mean that all the terms of the order were such that they fell within O. 45 r. 1(a)(i) of the Rules of Court 2012 ('ROC') so as to enable an applicant to commence committal proceedings for disobedience of the order. The terms as contained in the order had to be examined for substance and must ultimately be one which was recognised by law as constituting an act, the disobedience of which would attract the penalties or punishment which would flow from its breach or disobedience.*
>
> (emphasis added)

[50] Purely based on the facts of this case, this court cannot but arrive at the conclusion that the failure to endorse the consent order with a penal notice is based on the original intention that the consent order was never meant to be enforced by way of committal proceedings. This finding is further fortified when parties then embarked on negotiating the SPA. As such, the failure to have a penal notice endorsed on the said consent order was fatal to the case of the banks as laid down in *Inter Heritage (M) Sdn Bhd (supra*).

Whether The Consent Order Was An Order That Was Coercive In Nature

[51] In the absence of a penal notice, in order to cure such a defect, an examination of the wordings of the consent order must be made to see if it was coercive in nature.

[52] This court is of the view that upon a reading of the consent order, the drafting of the consent order was not in any manner coercive. Instead, it merely laid down the obligations of the parties. There was no threat of any action which is penal in nature incorporated into the said consent order. This therefore supported the argument that the consent order was worded as an agreement. This finding further reinforces the need to have the penal notice clearly endorsed on the said order if it had intended to carry penal consequences.

Analysis On Whether Enclosure 61 Should Be Allowed

Tan Sri Lim Not A Party To The Consent Order

[53] The banks alleged that Tan Sri Lim was in contempt when he breached the consent order. It was contended that although Tan Sri Lim was not a party to the consent order, he was equally bound by its terms as a result of the side letter. Given the above, he must be cited for contempt under the current application. Tan Sri Lim on the other hand alleged that he was never a party to the consent order but merely a signatory to the side letter which makes reference to the consent order.

[54] The argument to extend the liability of Tan Sri Lim under the consent order *via* the side letter is a non-starter. His liability arose after the consent order came into existence. He cannot therefore, be a party to the consent order originally entered between all parties.

[55] It follows therefore, at best, his obligations are under the SPA entered between the parties which this court found to have superseded the consent order. It therefore cannot be an act of contempt by Tan Sri Lim as he never was a party to the consent order.

[56] The banks also raised the additional argument that Tan Sri Lim was assisting the disobedience of a court order. This was because Tan Sri Lim was the "architect and mind" or "driving force and principal person" behind

the actions of the other alleged contemnors. It is the finding of this court that the argument by the banks is not backed by any factual allegation in the O. 52 statement. The statement lacked particularisation of how the said assistance was rendered by Tan Sri Lim. Such vague allegations cannot survive the strict requirements of O. 52 and is fundamentally flawed.

[57] In the Court of Appeal case of *Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors* [2009] 5 CLJ 412; [2010] 1 MLJ 644, it was held that:

> [13] The learned judge was clearly right in stating that an order will not be enforced by committal if its terms are vague or ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed. See Arlige, Eady & Smith on *Contempt* (2nd Ed) paras 12-43 p 746:
>
> > An order or undertaking will not be enforced by committal if its terms are ambiguous, the rule being analogous to that which governs the interpretation of penal statute. It is to the terms of the order itself that one must look in order to define the obligations imposed.

[58] It is perhaps appropriate to revisit the exact minute of the consent order relied on the banks as a basis to initiate the contempt proceedings. It reads as:

> (b) undertake not to file any further stay and/or injunction applications to prevent any auctions from proceeding.

[59] For the purpose of determining a *prima facie* contempt, the said minute must be strictly construed. As such, it is the finding of this court that Tan Sri Lim did not file any applications for any further stay or injunction to prevent the auctions from proceeding. If at all any action that can be said to have an effect of staying of the auctions, it was by Pavilion Yields.

Failure To Serve The Consent Order Personally On Tan Sri Lim

[60] It was pointed out by counsel that the consent order was never formally served on Tan Sri Lim. In his affidavit, Tan Sri Lim denied ever being served with the consent order. This is not a disputed fact and this court does not find it in any manner unusual given the fact that Tan Sri Lim was not a party to the consent order. In order to enforce a judgment by an order of committal under O. 45 r. 5(1)(A) of the ROC 2012, the said consent order must be served personally on the person affected. This is consistent with O. 45 rr. 7(2) and 7(4) of the ROC 2012 which provides that:

> (2) Subject to Order 26, rule 7(3), and paragraphs (6) and (7) of this rule, **an order shall not be enforced under rule 5 unless**:
>
> (a) **a copy of the order had been served personally on the person required to do or abstain from doing the act in question; and**

A ...

(4) **There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served:**

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain B from doing an act, **that if he disobeys the order, he is liable to process of execution to compel him to obey it; and**

(emphasis added)

[61] In *Capital Insurance Bhd v. BS Sidhu* [1995] 1 LNS 306; [1996] 3 MLJ 1, the Court of Appeal rejected the argument that there was no C requirement to carry out a personal service of the order as the alleged contemnor was in court when the order was pronounced. The court ruled personal service is still required before committal proceedings commenced:

We were unanimous in our view that although the respondent was present and heard the order directing him to refund the money deposited, D nonetheless, the respondent is required by the RHC to be served with the order personally before he could be said to have wilfully disobeyed the order. ...

As we have stated, we were unanimous in that we find merit in the argument of counsel for the respondent that before contempt E proceedings, which affect the liberty of a subject, can be enforced, there must be strict compliance with the rules that require the order of the court be served on the respondent. And we make no distinction that he was then counsel and present hearing the order.

[62] As such, failure to serve Tan Sri Lim personally with the consent F order was fatal to the banks' case.

Whether There Was Material Non-disclosure

[63] It is not disputed that the banks obtained the leave order *via* an *ex parte* application under O. 52 r. 3 of the ROC 2012. However, there is a duty on G the banks to ensure that their application is made with full and frank disclosure. In *Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060; [2013] 5 MLJ 541, it was held that:

[15] It must also be borne in mind that the application for leave to commence committal proceedings is made *ex parte*. *To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before* H *it. In an ex parte application, it means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application.* If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There I is no reason not to be able to do so for after all only the applicant has

> the opportunity to be heard upon it in the *ex parte* application. *It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily becomes a tool exploited for oppression.*
>
> ...
>
> [18] In the circumstances, we find that the learned judge had not erred in considering the facts not disclosed to be material and relevant and set aside the *ex parte* leave she had granted earlier.

(See also *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd* [2009] 2 CLJ 445; [2009] 1 MLJ 542).

[64] It was highlighted to this court that the banks failed to inform the court at the leave application that Tan Sri Lim:

(i) was not a party to the consent order (or the suit herein);

(ii) was not personally with the sealed consent order or that there was no penal notice endorsed on the consent order; and

(iii) was not given notice of any of the alleged breaches of the consent order.

[65] This court is of the view that the said information withheld would spark an inquiry if disclosed at the leave application stage. A court in considering an application for leave for contempt would certainly ask as to whether the alleged contemnor was a party to the order he purportedly failed to obey. It would also be important to the court to know if the said purported contemnor was served with the order in order to be bound by it. The above are material non-disclosures.

[66] This court agrees with the submission by counsel for the alleged contemnors that the non-disclosure was fatal as the banks only disclosed facts favourable to them.

[67] While the requirement of full and frank disclosure is one which is common to any *ex parte* application, the requirement becomes even more critical in cases where the outcome is to initiate contempt proceedings.

[68] The banks have failed to establish a *prima facie* case against Tan Sri Lim.

Analysis On Whether Enclosure 47 Should Be Allowed

[69] The O. 52 statement which outlines the contemptuous act of Pavilion Yields is vague and overly general in nature. It must be recalled that the basis to initiate the contempt proceedings is found on the banks' claim that Pavilion Yields was to "undertake not to file any further stay and/or injunction applications to prevent any actions from proceeding". However,

it was clear to this court that Pavilion Yields did not file any stay or injunction application. This therefore is in direct contradiction to the "breach" alleged which has to be clearly specified in the O. 52 statement. Failure to do so is fatal to the case of the banks as the allegation will be strictly construed. (See *Basset v. Magee* (*supra*)).

[70] As explained by counsel for Pavilion Yields, they filed the intervener application for the purpose of ensuring a higher valuation is obtained for the Dynasty Hotel foreclosure. The application also sought for an extraordinary general meeting to be held. The Pavilion Yields' OS was to seek declarations on the interpretation of the trust deed in particular, whether a resolution directing the first defendant to discontinue and cease all legal proceedings, requires an ordinary or special resolution. The two reasons given by Pavilion Yields were reasonable explanations and was sufficient to raise a doubt as to whether they had the requisite intention to breach the consent order.

[71] This court finds the O. 52 statement used by the banks in their leave application was poorly drafted as it did not particularise with precision the alleged contemptuous act. Pavilion Yields was entitled to rely on this defect as it clearly left this court questioning the exact breach committed by Pavilion Yields.

[72] This court finds that the banks have failed to make out a *prima facie* case of contempt against Pavilion Yields.

Analysis On Whether Enclosure 45 Should Be Allowed

[73] The basis for alleging contempt against the third and fourth alleged contemnors was based on the facts that they signed the affidavits in the Pavilion Yields' OS. It is obvious that they acted in the capacity of representatives of Pavilion Yields who believed that that they had a right to embark on the said Pavilion Yields' OS. Given the finding of this court that the banks have failed to prove a *prima facie* case of contempt against Pavilion Yields, it follows that no *prima facie* case has been established against the third and fourth alleged contemnors.

[74] This court finds that the banks have failed to make out a *prima facie* case of contempt against Pavilion Yields.

Conclusion

[75] A committal application is akin to a criminal charge. The court order which is the subject of the contempt proceedings must be clear and unambiguous. Lee Hun Hoe CJ (Borneo) in *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151 discussed several eminent decisions in coming to the conclusion that the burden was on the

party making the charge to prove all the charges beyond reasonable doubt. Where the party seeking to invoke the power of the court to commit people to prison and deprive their liberty, there has got to be clear certainty about it.

[76] This court finds that the banks have failed to prove their charges to the standards required in *TO Thomas* (*supra*). As such, it is the finding of this court that the applications in encls. 45, 47 and 61 is therefore allowed. The leave order for committal dated 20 January 2016 is hereby set aside.